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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON

8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 MISAEL HERNANDEZ-  
12 HERNANDEZ,

13 Defendant.  
14

NO. CR-02-2127-RHW

**ORDER DISMISSING  
DEFENDANT'S § 2255 PETITION**

15 Before the Court is Defendant's Petition to Vacate, Set Aside, or Correct  
16 Sentence by a Person in Federal Custody under 28 U.S.C. § 2255 (Ct. Rec. 42),  
17 filed February 1, 2005. Defendant pleaded guilty to being an Alien in the United  
18 States After Deportation, in violation of 8 U.S.C. § 1326, and on December 17,  
19 2002, was sentenced to 65 months of incarceration, 3 years of supervised release,  
20 and a \$100 special penalty assessment. Defendant appealed this sentence to the  
21 Ninth Circuit, and the Ninth Circuit affirmed on June 30, 2004.

22 **DISCUSSION**

23 Under 28 U.S.C. § 2255, a federal prisoner may move the court to vacate, set  
24 aside, or correct his or her sentence on the grounds that (1) the sentence was  
25 imposed in violation of the Constitution or laws of the United States; (2) the court  
26 was without jurisdiction to impose such sentence; or (3) the sentence was in excess  
27 of the maximum authorized by law. "Unless the motion and the files and records  
28 of the case conclusively show that the prisoner is entitled to no relief, the court

1 shall cause notice thereof to be served upon the United States attorney.”

2 Section 2255. Pursuant to Rule 4(b), Rules Governing Proceedings in the United  
3 States District Courts under Section 2255, the Court may, *sua sponte*, dismiss the  
4 motion if “it plainly appears from the face of the motion . . . that the movant is not  
5 entitled to relief in the district court.”

6 Defendant is asserting that his sentence imposed by this Court is in error  
7 because (1) Defendant was illegally sentenced; (2) the 16-point enhancement was  
8 incorrectly applied; and (3) Defendant was sentenced above the statutory  
9 maximum. In reviewing Defendant’s § 2255 petition, it is clear that Defendant is  
10 entitled to no relief.

11 Defendant incorrectly argues under Ground (1) that it is illegal to plead  
12 under § 1326(a) and be sentenced under § 1326(b)(2). Defendant contends that he  
13 was unconstitutionally sentenced in excess of the maximum authorized by law.  
14 Because Defendant pleaded under § 1326(a), which carries a maximum  
15 imprisonment of two years, Defendant believes that his current sentence of sixty-  
16 five months was illegally imposed.

17 Defendant, however, misunderstands the framework of the statute. Section  
18 1326(a) outlines the offense and provides a minimum sentence to be imposed for  
19 violators of that offense. The following provision, § 1326(b), provides more  
20 excessive sentences to be imposed for those defendants who commit the offense  
21 subsequent to conviction for certain crimes.

22 Defendant was convicted under § 1326(b)(2) because he illegally returned  
23 to the United States after having been deported subsequent to an aggravated felony  
24 conviction. Under his applicable statutory subsection, the maximum sentence  
25 authorized by law increases to twenty years. Section 1326(b)(2) is only a penalty  
26 provision. *See Almendarez-Torres v. United States*, 523 U.S. 224, 231 (1998). It  
27 does not serve to define a separate immigration-related offense. *Id* at 225. Notably,  
28 the statute includes the words “subject to subsection (b)” at the beginning of

1 subsection (a) and “notwithstanding subsection (a)” at the beginning of subsection  
2 (b). Moreover, the fact that Congress intended to treat this subsection as a  
3 sentencing factor, rather than an element of the offense, does not exceed due  
4 process or other constitutional limits on Congress’s power to define elements of a  
5 crime. *Id.* at 234-37.

6 With respect to Ground (2), Defendant appears to be asserting that the  
7 sixteen-point enhancement was imposed in violation of Defendant’s Fifth and  
8 Sixth Amendment rights. Defendant contends that the enhancement was  
9 incorrectly applied because it was a sentencing factor that was not charged in the  
10 indictment. Defendant appears to assert that it is unconstitutional for a court to  
11 withhold any fact that increases the penalty for a crime beyond the statutory  
12 maximum. Defendant also argues that it should not be applied because he did not  
13 stipulate or admit to the additional factors.

14 Defendant’s argument is without merit and based on a flawed understanding  
15 of the application of sentencing factors. The United States is not required to cite  
16 such factors in its indictment. Under the Due Process Clause of the Fifth  
17 Amendment and the notice and jury guarantees of the Sixth Amendment, it is well-  
18 settled that “[o]ther than the fact of a prior conviction, any fact that increases the  
19 penalty for a crime beyond the prescribed statutory maximum must be submitted to  
20 a jury . . .” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (emphasis added);  
21 *United States v. Quintero-Junco*, 2005 WL 1635344 (9th Cir. 2005) (finding that  
22 district court did not violate defendant’s constitutional rights by enhancing his  
23 sentence under § 1326 based on his prior conviction.) Here, the Defendant’s 16-  
24 point enhancement was predicated upon his prior aggravated felony conviction.  
25 Moreover, Defendant stipulated to a crime of violence in an earlier court  
26 proceeding. That stipulation provides the basis for Defendant’s enhanced sentence.

27 Under Ground (3), Defendant asserts that his sentence was imposed in  
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excess of the maximum authorized by law. Defendant contends that recent case  
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1 law mandates that his prior sentencing factors should not have been considered by  
2 this Court. Under Defendant's reasoning, his base offense level of eight, coupled  
3 with a criminal history of I, would create a statutory maximum of six months.

4 This contention is erroneous for two reasons. First, this Court properly  
5 applied the Federal Sentencing Guidelines. Defendant is correct in asserting that a  
6 § 1326 violation provides a base offense level of eight. *See* U.S.S.G. § 2L1.2(a).  
7 That base level, however, increases by 16 points when a defendant has been  
8 previously convicted of a felony that constitutes a crime of violence. *See* §  
9 2L1.2(b)(1)(A)(ii). Because Defendant has a prior aggravated felony conviction,  
10 his final offense level of 24, coupled with a criminal history of II for his prior  
11 conviction, produces a sentence of 57-71 months. Thus, Defendant's sentence of  
12 65 months clearly falls below the statutory maximum.

13 Second, Defendant relies on two recent Supreme Court decisions that are  
14 inapplicable to his case. *Blakely v. Washington*, 542 U.S. 296 (2004) and *United*  
15 *States v. Booker*, 125 S. Ct. 738 (2005) cannot be applied to Defendant's § 2255  
16 motion. Courts have consistently held that neither *Blakely* nor *Booker* should be  
17 applied retroactively to cases on collateral review. *Schardt v. Payne*, 2005 WL  
18 1593468 (9th Cir. 2005); *Cirilo-Munoz v. United States*, 404 F.3d 527, 533 (1st  
19 Cir. 2005); *Humphress v. United States*, 398 F.3d 855, 862-63 (6th Cir. 2005);  
20 *McReynolds v. United States*, 397 F.3d 479, 480-81 (7th Cir. 2005); *Varela v.*  
21 *United States*, 400 F.3d 864, 868 (11th Cir. 2005). Furthermore, the Supreme  
22 Court specifically stated in *Booker* that its holdings apply "to all cases on direct  
23 review." 125 S. Ct. at 769. This statement evidences the Supreme Court's intent  
24 that *Booker* should not be applied retroactively to cases on collateral review.  
25 Consequently, the recent decisions have no bearing on Defendant's case.

26 For these reasons, Defendant is not entitled to any relief in the district court,  
27  
28 and summary dismissal is proper.

1 Accordingly, **IT IS HEREBY ORDERED** that the Defendant's Petition to  
2 Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody 28 U.S.C.  
3 § 2255 (Ct. Rec. 42) is **DISMISSED**.

4 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
5 order, to provide copies to the Defendant, and **close** the file.

6 **DATED** this 25<sup>th</sup> day of July, 2005.

7  
8 s/ ROBERT H. WHALEY  
9 United States District Judge

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